June 2. 1768.

INFORMATION

FOR

GEORGE DEMPSTER of Dunnichen, Esq; Advocate,
PANNEL:

AGAINST

ROBERT GEDDIE, *junior*, merchant in Coupar in Fife, and Mr ROBERT MACINTOSH, Advocate.

THE Pannel stands accused and indicted, at the instance of the two prosecutors above named, for various acts of bribery said to have been actually committed, and others attempted to be committed, on occasion of the annual election of magistrates and counsellors in the borough of Coupar at Michaelmas last.

As this information respects some preliminary questions, we are not now at liberty to challenge the facts contained in the indictment. These must, *in hoc statu*, be taken for granted: But your Lordships know, that in arguing upon the relevancy of them, neither the truth nor the justice of them are understood to be acknowledged or admitted.

The different judicial steps which have taken place since the execution of the criminal letters are set forth in the information on the part of the prosecutors; and therefore, as it is unnecessary, it would be improper, again minutely to recite them: There is only one particular observation in the course of the narrative which, in justice to Mr Dempster, his counsel cannot allow to pass without animadversion: It is insinuated, That if he had been conscious of his innocence, he would have embraced the earliest opportunity of going to trial, and would not have retarded the speedy conclusion of it by pleading his situation as a member of parliament.

But

But Mr Dempſter is in the judgment of your Lordſhips, how far there is the ſmalleſt foundation for this obſervation: It was to the proſecutors a matter of abſolute indifference, whether the trial, if at all to proceed, ſhould go on in the month of December or March; and Mr Dempſter never pled his character as a member of parliament farther than that he ſhould not be obſtructed in his attendance during the ſitting of the ſeſſion of parliament; but he was always willing, and voluntarily declared ſo the very firſt opportunity after his duty in parliament was over, to undergo the judgement of your Lordſhips upon the criminal letters with which he is charged. But ſo, long as the ſeſſion of parliament remained, he would have conſidered himſelf as acting a part unworthy of his ſeat, if he had allowed any great conſtitutional queſtion relative to the privilege of parliament to be indirectly injured in his perſon.

The general argument which the counſel for the pannel maintained at the pleading upon the relevancy was, That this indictment could not paſs to the knowledge of an aſſize, in reſpect, not only that the crimes charged were unknown in the common law of this country, upon which the indictment is laid, but likeways, that the intereſt upon which the proſecutors pretended to ſue was ſuch as the criminal law of this country did not acknowledge. It was further objected, That although bribery itſelf ſhould be thought indictable at common law, ſtill the whole of the indictment muſt fall to the ground, in ſo far as it charges bare and unſucceſsful attempts to corrupt, which were not of ſuch a nature as to be proſecutable in this ſupreme criminal court; eſpecially at the inſtance of private proſecutors, who, in no event, could qualify the ſmalleſt injury or damage from thoſe attempts.

It is propoſed in this information, to bring the ſame points under the conſideration of your Lordſhips, in the order above ſuggeſted; which, in the *firſt* place, leads to examine how far this crime is competent or known as a crime in the common law of Scotland.

In entering upon this argument, the counſel for the pannel feel themſelves treading upon very delicate ground; for, as the minds of men are ſo much accuſtomed to view bribery in that obnoxious light

light which is ſuggeſted by the inexpediency and general prevalence of that practice, it is difficult to bring judges to conſider the caſe independent of theſe ideas. But as they are conſcious that your Lordſhips, in every criminal queſtion, are capable to lay aſide prepoſſeſſions of every kind, the argument ſhall be treated with freedom; and they hope, upon ſafe and ſound principles, to maintain that bribery is not puniſhable in the manner that is now demanded; nor does the good and well-being of the conſtitution, in any degree, require the aid of ſuch proſecutions as this.

In general, it will be obſerved by your Lordſhips, that the indictment is not laid upon any ſtatute whatever, but upon the laws of the realm in general; ſo that it is neceſſary for the proſecutors to point out thoſe precedents or authorities by which they contend that bribery is criminal at common law, independent of thoſe particular ſtatutes which have been enacted againſt it.

The definition of common law is a thing which we are at no loſs to find out. It was deſcribed to us by the ancient Civilians, to be that law which, altho' the origin of it cannot be traced, *moribus et conſuetudine inductum eſt*; and the diſtinction betwixt *lex ſcripta*, meaning ſtatutory law, and *lex non ſcripta*, meaning conſuetudinary or common law, has been adopted by the writers in every age and nation ever ſince the time it was firſt given us by the Roman lawyers.

It would be endleſs to quote authorities in ſupport of this definition; it is ſufficient to refer to every author who has wrote upon law: And in particular, as the law of England boaſts of having the boundaries betwixt their different ſpecies of laws nicely aſcertained, if your Lordſhips would take the trouble to look into Blackſtone's late inſtitutes of the law of England, you will there find, that thro' the whole, the *lex non ſcripta*, the conſuetudinary or common law, are uniformly uſed as ſynonymous terms. In one place he condeſcends upon a variety of particulars in the law of England, and adds: "All theſe are doctrines that are not ſet down in any written ſtatute or ordinance, but depend merely upon immemorial uſage, that is, upon common law, for their ſupport." Introd. § 3. p. 68.

Again,

Again, after making mention of ſome eſtabliſhed maxims, and of a diſtinction which ſome would eſtabliſh betwixt *cuſtoms* and *maxims*,
p. 68. he ſays: "But I take theſe to be one and the ſame thing; for the "authority of theſe maxims reſt entirely upon general reception and "uſage; and the only method of proving that this or that maxim "is a rule of the common law, is by ſhowing that it hath been al-"ways the cuſtom to obſerve it."

And he concludes his obſervations upon the nature of the common law of England with this encomium: "Indeed it is one of the cha-"racteriſtick marks of Engliſh liberty, that our common law de-"pends upon cuſtom, which carries this internal evidence of free-"dom along with it, that it probably was introduced by the voluntа-"ry conſent of the people."

Such being the genuine nature and import of common law, as uniformly defined by all lawyers, without one contradictory voice, ſo far as known to the pannel, it will be no difficult matter to apply the principle to the caſe in hand. It will be remembered by your Lordſhips, that both previous to the pleadings, and when the informations were ordered, it was recommended to the proſecutors and their counſel, to condeſcend upon a ſingle example wherever an action ſuch as the preſent had been brought before this court. But, after full time for an accurate ſearch of the records and books of adjournal, no ſuch example has as yet been produced; ſo that, if the rule is juſt, That common law is nothing elſe but cuſtomary or conſuetudinary law eſtabliſhed by immemorial uſage and long conſent, nothing can be clearer than that this indictment muſt fall to the ground, as being laid upon common law, and yet not one precedent adduced to ſupport it. And this too is entirely agreeable to the rule laid down by the author already more than once quoted, who, upon
p. 71. the evidence of what is common law, ſays: "Upon the whole, we "may take it as a general rule, That the deciſions of courts of ju-"ſtice are the evidence of what is common law, in the ſame manner "as in the civil law, what the Emperor had once determined, was "to ſerve as a guide for the future."

Againſt

Againſt the principles hitherto maintained, it is argued on the part of the proſecutors, That if nothing was to be held common law except what could be evidenced by cuſtom and conſuetude, there never could be any common law; becauſe every conſuetude muſt have a beginning; and the queſtion is put, How came the firſt perſon who was tried for crimes not eſtabliſhed by ſtatute to be condemned? and yet there have been many ſuch condemnations. p. 10. inform.

But the anſwer to this is obvious: There are none ſuch but what were underſtood to be clear violations of the law of nature, or of moral rectitude, ſuch as inceſt, ſodomy, &c. But where an action in itſelf abſtractly conſidered is either indifferent or unattended with the ſenſations of guilt, it requires either ſome poſitive law, or ſome eſtabliſhed practice founded on expediency, to make it criminal.

And here the counſel for the proſecutors do not ſeem to attend to the material difference there is betwixt the early and more advanced periods of the law of a country. Crudeneſs and uncertainty is one of thoſe many inconveniences which attend an unformed ſyſtem of laws, and muſt, from neceſſity, be born in the early proceedings of courts, while the law is defective and imperfect: But it ripens by degrees, either in the way of ſtatute or by cuſtom, and repeated deciſions of courts forming in proceſs of time a fixed and a known rule on which the ſubject relies for direction and ſecurity. What the experience of many paſt ages has found to be equitable, is probably the wiſeſt and beſt-known part of our law. While this rule was forming, the ſubject did not feel himſelf ſecure. When the rule is formed, there can be no greater ſecurity.

In early ages, courts of juſtice were frequently gropping for law, and the ſubject was uncertain where they were to find it, and how it might apply to his caſe. But it is obvious, that this is a ſtate of ſociety not to be imputed to the advanced period of our law; for the whole object of legiſlation has been to correct ſuch a rude and defective policy, by introducing fixed rules and ſtrict law, eſpecially in all criminal and penal matters. When caſes now happen unprovided for by ſtatute or cuſtom, it is the duty of judges to acknowledge the defect, that the legiſlature, if it thinks it expedient, may

apply the remedy. Such queſtions, in the preſent improved ſtate of our law, can only relate to matters of ſuch moment as may well admit of all the delay which, from the frequent meeting of our legiſlative aſſembly, is neceſſary; and this much rather than ſtrike a blow at the ſecurity of the ſubject by any ſort of diſcretionary proceeding.

It is further argued for the proſecutors, That, independent of any cuſtom or precedent, bribery is criminal at common law, on account of the immorality and evil tendency of it.

But the pannel muſt fairly confeſs, that this is a ſpecies of reaſoning which he does not thoroughly comprehend: For, in the firſt place, with regard to the immorality of the act, the proſecutors ſhould have been more accurate in aſcertaining the principle upon which they would eſtabliſh the turpitude and immorality of it, in an abſtract view, and independent of that inexpediency which has weighed with the legiſlature to reſtrain it by ſuch a variety of ſtatutes. It may be ſafely acknowledged, that the giving or taking bribes in order to influence the opinion of judges, is a moral turpitude, becauſe creative of injuſtice, which is prohibited by every rule of morality: But in conſiſtency with practices daily allowed without challenge or blame, the pannel muſt be forgiven to doubt, if the elector of a member of parliament is conſidered to act in a judicial capacity; for, if ſuch was the caſe, it is impoſſible that canvaſſing and ſolicitation could be at all tolerated; and yet they are publicly exerciſed; and far leſs could perſons be at liberty to beſtow their ſuffrages upon their own very neareſt relations, which is the uſual method of an elector giving his voice on occaſion of an election.

But further, allowing bribery, on account of the inexpediency and deſtructive tendency of it, to be of an immoral nature, the pannal would beg leave to aſk, Where is the rule of law, which ſays, that every act, becauſe immoral, or having an evil tendency, is therefore actionable before a criminal court? However ſpecious ſuch a propoſition may appear to be, yet it may with confidence be ſaid, that no propoſition could be more deſtructive to the intereſts or ſecurity of mankind. Every ſubject is bound by the laws of his country,

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and is intitled to think himſelf ſecure while he does not offend againſt the law. But, if the ſenſe of morality, in proſecutors and judges, was to have the effect of law, ſo as to render actions criminal in a legal ſenſe, the ſecurity of the ſubject is attacked, he holds it at diſcretion, and by a rule which he cannot know, "the opinion "which others may form of his actions." In fact, conſcience is the ſole judge of immoralities; and therefore, if proſecutions in a criminal court were to be allowed, upon a charge of immorality, or evil tendency, without the authority either of ſtatute or common law, the Court of Juſticiary would ceaſe to be a court of law, and aſſume the characteriſtic of a court of conſcience; than which nothing can be more inconſiſtent with the liberty and ſecurity of any free ſtate. Conſcience varies in different men; and no man can be bound by any conſcience but his own, and that of the legiſlature and eſtabliſhed laws of his country.

Giving money to the electors of a magiſtracy, with a view to promote any particular point, is by no means criminal in itſelf, conſidering it in an abſtract view. It is a very innocent and harmleſs act, much more ſo than giving drink, which may end in debauchery, loſs of time, and ruin of the morals. But as this practice of giving money may be attended with hurtful conſequences to the particular conſtitution of our government, which in ſo far differs widely from that of France and ſome other countries; ſo the legiſlature has conſidered it as a political evil, and has, in certain caſes, provided remedies againſt it. Theſe very remedies ſhow, that it was not conſidered as a crime at common law; for, had it been an indictable offence, for which the perſon guilty might at any time have been brought to the bar of the criminal court, there would not have been occaſion for any further remedy.

It was next pleaded in ſupport of the competency of this crime, That the criminality of bribery was eſtabliſhed by different ſtatutes in ſeveral predicaments, which ſhowed the ſenſe of the legiſlature with regard to this practice in general; which ſenſe was to be applied and extended to bribery, in every mode and every ſhape in which it ſhould be made uſe of to influence an election.

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We ſhould live in a miſerable and unhappy ſtate indeed, if conſtructive crimes were in this manner to be eſtabliſhed by artificial reaſoning: There is no law, except either ſtatutory or common law. With regard to the latter of theſe, the nature of it has been already explained; and as to ſtatutory law, the crime is created and owes its exiſtence to ſtatute; and therefore it is the ſtatute only which can determine the extent of it; and it cannot be enlarged beyond the letter of the law by conſtruction, argument, or arbitrary diſcretion of judges. It was under the authority of ſuch poſitions as that maintained by the preſent proſecutors, that our forefathers of the laſt age underwent ſuch grievous oppreſſion. When a perſon was obnoxious, his condemnation was reſolved upon, and the mode of carrying it into execution was deviſed by the ingenuity of ſome able lawyer employed to make out the crime by conſtructive reaſoning from ſome cuſtom or ſtatute; and, when the words were defective, the arbitrary will of the judge ſupplied the defect.

Much might be ſaid upon this ſubject: But rather than uſe words of his own, the pannel ſhall addreſs himſelf to your Lordſhips in the concluding words of the famed Lord Stratford to the judges, who ſat and condemned him upon conſtructive crimes. "Where has this ſpecies "of guilt lain ſo long concealed? where has this fire been ſo long "buried during ſo many centuries, that no ſmoke ſhould appear "till it burſt out at once to conſume me and my children? Better it "were to live under no law at all, and, by the maxims of cautious "prudence, to conform ourſelves the beſt we can to the arbitrary will "of a maſter, than fancy we have a law on which we can rely, and "find at laſt that this law ſhall inflict a puniſhment precedent to the "promulgation, and try us by maxims unheard of till the very mo-"ment of the proſecution. If I ſail on the Thames, and ſplit my "veſſel on an anchor, in caſe there be no bouy to give warning, the "party ſhall pay me damages; but, if the anchor be marked out, "then is the ſtriking on it at my own peril. Where is the mark ſet "upon this crime? where is the token by which I ſhould diſcover it? "It has lain concealed under water, and no human prudence, no hu-

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" man innocence could ſave me from the deſtruction with which I " am at preſent threatened.

" It is now full 240 years ſince treaſons were defined, and ſo long " has it been ſince any man was touched to this extent upon this " crime before myſelf. We have lived, my Lords, happily to " ourſelves at home, we have lived glorioufly abroad to the world: " Let us be content with what our fathers have left us: Let not our " ambition carry us to be more learned than they were in theſe kill- " ing and deſtructive arts. Great wiſdom it will be in your Lordſhips, " and juſt providence for yourſelves, for your poſterities, for the " whole kingdom, to caſt from you into the fire theſe bloody and " myſterious volumes of arbitrary and conſtructive treaſons, as the " primitive Chriſtians did their books of curious arts, and betake " yourſelves to the plain letter of the ſtatute, which tells you where " the crime is, and points out to you the path by which you may a- " void it."

But further, we do humbly apprehend, that in place of aiding the proſecutors cauſe, the various ſtatutes which have been enacted againſt bribery, in certain particulars, do operate ſtrongly in the ſcale of argument againſt it. When the legiſlature remains totally ſilent upon any ſpecies of action, it may be plauſibly argued that it does ſo becauſe leaving it to the dictates of common law; but where it does actually interpoſe, and does from time to time, by poſitive enactments, make enlargements to the crime, and additions to the penalty, it never can mean that courts of law, without any precedent or cuſtom to ſupport their juriſdiction, ſhould further interfere to make diſcretionary and unlimited extenſions.

Accordingly, it will be obſerved, the legiſlature has provided remedies againſt every mode of the offence which it was thought neceſſary or material to guard againſt. If returning officers are corrupted, or do any wrong at elections, they are puniſhable. If any wrong is done at an annual election of magiſtracy and council, and particularly if it be brought about by bribery, the election is liable to be reduced. If bribes are given, or ſo much as aſked at the election of a delegate, or of the member, a ſtatutory proſecution lies for pe-

nalties and diſabilities. Theſe remedies were thought ſufficient by the legiſlature; and it does not occur, that judges have a power to extend them any further. Perhaps, if the evil grows more prevalent, new remedies may be introduced, and it may be made an indictable crime, to give money to the members of an incorporation at the annual election of magiſtrates: Nay, it may be made a crime to drink with them, or ſo much as to ſpeak to them; and this may be extended alſo to the election of deacons, to the admiſſion of members into a corporation, and to every previous ſtep of election: But all this muſt take its riſe from poſitive enactment, and judges cannot, merely from their own notions of expediency, create political offences, and award arbitrary puniſhments againſt thoſe guilty of them.

In criminal matters, the law ought to be fixed and aſcertained, and nothing left to the arbitrary will of judges. Monteſquieu, in treating of this ſubject ſays, 'It was a fault in the republic of Sparta for the "Ephori to paſs arbitrary judgements without having any laws to "direct them." And, to the praiſe of the criminal law of Rome, he obſerves, "That the judges had no more to do than to declare, "that the perſon accuſed was guilty of a particular crime, and then "the puniſhment was found in the laws." He adds, "In England, "the jury determine whether the fact brought under their cogni- "zance be proved or not; if it be proved, the judge pronounces the "puniſhment inflicted by the law for ſuch a particular fact; and for "this he needs only open his eyes." He would not ſurely have beſtowed the ſame encomium upon the laws of Scotland, had he known that a perſon might be indicted and tried at common law for a mere conſtructive offence, which is not declared puniſhable by any expreſs law, which is not founded on any ancient cuſtom or practice, which is not noticed as a crime in any one law-book, and which is not a violation of any natural or univerſal law.

B. 6. chap. 3.

Upon this point it ſhall be only further obſerved, that this conſtructive method of conſtituting a crime adopted by the proſecutors, is not only contrary to ſound and ſafe principles, but it is likeways unſupported

unſupported by any analogy from other caſes. This has been illuſtrated by various examples.

The caſe of uſury is an obvious one; for, although various ſtatutes have been enacted in order to reſtrain the crime and puniſh the uſurer, was it ever heard of that a perſon could be indicted in a criminal court for uſury at common law, although the evil and deſtructive tendency of it to commerce cannot be called in queſtion, and the criminality of it, in the language of the proſecutors, is eſtabliſhed by different ſtatutes?

The proſecutors are pleaſed to ſay, That the counſel for the pannel had miſapprehended the law: But the miſapprehenſion does not ſeem to be ſo accurately pointed out, that they are able to diſcover wherein it conſiſts. On the contrary, the pannel muſt be forgiven to ſay, that he cannot diſcover the ſtrength of the proſecutor's argument, when he quotes a ſtatute as far back as the *Regiam Majeſtatem*, in order to prove that uſury was criminal at common law before the act of James VI. unleſs they could likewiſe prove, that James VI. lived before the *Regiam Majeſtatem*. But it is impoſſible to conceive how this matter can bear an argument; for no principle of the law of nature or morality could ever ſuggeſt to the mind of man the criminality of taking as much intereſt for the loan of his money as he poſſibly could; and even after the ſtatutes have introduced reſtrictions, the argument for the pannel remains entire, that there is no example in practice, nor no authority of a lawyer in theory, to maintain that uſury is culpable or puniſhable at common law; and yet every argument uſed in the preſent caſe would equally apply to that. This then is one example to prove that every thing made wrong by ſtatute, does not therefore become criminal at common law.

Smuggling is an example of a ſimilar nature, which though puniſhed by various penalties, yet no proſecutor ever thought of bringing any of that pernicious race to ſtand trial at common law, although the hurtful conſequences of it to every vital part of the conſtitution cannot be called in queſtion. The proſecutors ſay, there is nothing ſtands in the way of a criminal proſecution on account of ſmuggling; for it is a ſpecies of theft by which the crown is defrauded. But the

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pannel cannot ſubſcribe to that doctrine: Theft has a definite idea in law; and if it were to be extended in the looſe illogical manner ſuggeſted, every ſpecies of fraud is a theft upon the ſame principle, and might be criminally proſecuted. But, without dwelling longer upon the argument, it is clear that the proſecutors poſition, that ſmuggling may be criminally proſecuted independent of the ſtatutes, is a mere *petitio principii*, againſt which the pannel oppoſes the fact, that notwithſtanding the eagerneſs of all good miniſters and magiſtrates to ſuppreſs the fraudulent practices againſt the revenue; yet no ſuch proſecution at common law appears ever to have been brought either in this or our neighbouring country, which is at leaſt pretty ſtrong negative evidence of the ſenſe of lawyers in both countries.

The pannel, not to trouble your Lordſhips more than neceſſary, ſhall only add one example more. Gaming is a ſtriking one: No body will read the ſtatute-book and doubt of the culpable and criminal light in which it has always appeared to the legiſlature. But it is left with your Lordſhips without argument, to determine in what light an indictment at common law, charging a perſon with loſing more money than he ought to have done, would be received in this court.

The proſecutors next endeavour to ſupport the indictment at common law, by alledging, that the Roman law is the common law of Scotland; and as bribery was puniſhed among the Romans by the *lex Julia de ambitu*, ſo in like manner it muſt be a crime at common law amongſt us.

But this, with ſubmiſſion, is perfectly abſurd: It was not even a crime among the Romans till made ſo by expreſs ſtatute; and upon looking into the account of that crime among them, as given by Mathæus, your Lordſhips will obſerve, that even amongſt the Romans this practice was looked upon in different lights, according to the change of their manners and modes of government they underwent. It is however unneceſſary to enter more minutely into that diſcuſſion; for, although in ſome of our old ſtatutes, the Roman law is vaguely termed our common law, it is out of all ſight to apply that to criminal matters. This at moſt can only hold in matters of civil juriſprudence:

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It may be proper to reſort to its maxims, as to contracts, obligations, and ſuch like, which muſt be governed by the ſame principles in all countries; but it would be ridiculous to adopt its crimes and puniſhments, for theſe muſt be different in different countries, according to their ſeveral conſtitutions, climates, and other circumſtances; and hence it is, that ſome things are criminal in one country, which in another are not only innocent but laudable and praiſe-worthy.

Another argument in ſupport of the competency of this crime at common law is founded upon the preamble of the act of George the Second, which ſays, "That the laws already in being have not "been ſufficient to prevent corrupt and illegal practices in the elec- "tion of members to ſerve in parliament." From which words it is argued, that the legiſlature muſt have underſtood it to be an offence even previous to the enactment of this ſtatute.

Various anſwers occur: In the *firſt* place, this ſtatute relates to England as well as to Scotland, and the pannel knows not but there may have been criminal ſtatutes in that country againſt bribery, previous to the ſecond of George the Second.

2*dly*, The general words in the preamble of the ſtatute would moſt properly be explained to refer to thoſe civil remedies, which would no doubt be competent either to the houſe of parliament or courts of law, to rectify the different wrongs that might be committed at elections, to ſupply the deficiency of which the criminal enactments in ſuch a variety of particulars were introduced by this act of the legiſlature.

3*dly*, If no other anſwer could have been made, it would certainly have been ſufficient to ſay, that the vague or general preamble of a ſtatute could never eſtabliſh the exiſtence either of ſtatute or common law, if in fact, upon inquiry, it appears that either the one or the other did not exiſt.

Laſtly, The pannel does with much more reaſon plead, that the preamble of this ſtatute proves, that no ſuch action as that now attempted was underſtood to exiſt; for, if the legiſlature had thought that, for every act of bribery of any kind, or even attempt to corrupt, it was competent to bring the offender to the bar of the ſu-

preme criminal court, concluding for the pains of law, *i. e.* for such arbitrary puniſhment, by fine, pillory, or impriſonment, as judges ſhould pleaſe to inflict, it would never have declared that ſuch a remedy was not adequate to every one of the corrupt and illegal practices mentioned in the ſtatute.

At the pleading upon the relevancy, the proſecutors were pleaſed to refer much to the law of England in ſupport of this part of their plea. Theſe references were only general, without reſorting to authority or precedent; and therefore it was recommended to the counſel by your Lordſhips to be more particular in condeſcending upon the arguments they drew from the law of England. If this requeſt had been complied with, and they had been able to ſupport their argument by the moſt pointed authorities from that law, ſtill the pannel would have ſtrenuouſly contended before your Lordſhips, that it would not have varied the caſe, becauſe he is intitled to be tried by the laws of his own country; and altho' a variety of precedents or deciſions of the courts of law would have inſtructed bribery to be criminal by the common law of England, ſtill it would not proved it to have been criminal law of Scotland, where no ſuch proof of conſuetudinary law has or can be produced.

But it is unneceſſary to ſay any more upon that head, becauſe no ſuch proof has been produced even from the law of England; and the aſſertion ſeems to be dropt out of the information for the proſecutors.

The pannel ſhall conclude his obſervations upon this part of the argument with taking notice, that if the competency of trying every ſpecies of this kind by a general charge at common law were to be ſuſtained, it would lead into this manifeſt abſurdity, that a perſon guilty of a leſſer ſpecies of bribery, at any previous ſteps of election, would be in a worſe ſituation than he who had been guilty to the utmoſt extent of the crime, by bribing either the delegate or immediate electors of a member of parliament: For, in the caſes laſt mentioned, the law has not only given an abſolute *quietus* to offenders who in twelve months after the election ſhall diſcover any other offenders, but it has ſpecially ordained, that no perſon ſhall be liable

to

to any penalty upon the ſecond of George II. unleſs the proſecution is commenced within two years after the penalty is incurred; whereas no ſuch defence or limitation could be beneficial to him, even in a leſſer ſpecies of bribery, if it is competent to try him for the ſame at common law, as is now contended on the part of the proſecutors.

This laſt obſervation does, with ſubmiſſion, of itſelf demonſtrate, that the legiſlature did not conſider any other action to be competent either for thoſe greateſt, or for any other leſſer ſpecies of bribery; for theſe ſpecial enactments either of a total abſolvitor in the caſe of a diſcovery, or of a limitation of the action under the ſtatute, would have been totally abſurd, if it had conſidered a proſecutor at liberty to bring an action charging the offence at common law, which does not admit any ſuch defence, which is arbitrary in its puniſhment as the will of the judge ſhall ſuggeſt, and is not limited by any period of endurance whatever.

The proſecutors ſeem to be conſcious of their inability to ſupport this indictment at common law, and therefore are at pains to perſuade your Lordſhips, that it may be ſupported as an indictment laid upon the ſtatute; becauſe the ſtatutes are part of the laws of the realm, and the indictment charges the facts alledged to have been committed againſt the laws of the realm.

But if ſuch arguments as this are to be liſtened to, there is an end of all certainty and regularity in criminal procedure. It is of the utmoſt importance that criminal libels ſhould be accurately and preciſely framed, and that the pannel ſhould know with certainty upon what law he is accuſed; more eſpecially, where the act laid to his charge is not a violation of morality, or of the law of nature, but of that kind which requires poſitive law to make it criminal: For example, ſuppoſing it ſhould be charged, that, by the law of this, as well as of other well governed realms, it is highly criminal for ſoldiers to remain in a borough, or within ſo many miles of it, at the time of the elections of ſaid borough; or that it is highly criminal to buy up meal coming to a market-town within ſo many miles of ſaid town; ſurely a libel of this kind would not be ſuſtained, becauſe, at common

mon law, and according to the natural feelings of mankind, there is nothing which renders any of these actions criminal; the criminality of them can only consist in their being done *spreta auctoritate* of some express enactment of the legislature, founded upon reasons of expediency; and, in order that it may appear whether the fact charged does really come under the description of the statutory crime or not, the statute must be expressly set forth and libelled on. Another instance may be given in this very case of bribery, viz. that, by a particular statute, the asking a bribe is, in the particular instances mentioned in the statute, rendered criminal, and may be the foundation of a prosecution concluding for certain penalties upon that statute. Now, suppose the statute was to be overlooked, and a criminal libel brought, charging the fact of asking bribes as a high crime, severely punishable, &c. it is, with submission, thought, that such libel would not be sustained; for it is only in particular cases that the asking bribes is made criminal even by statute; and it is certainly no crime punishable at common law: The pannel is intitled to insist in such cases, that the law be specifically set forth, in order that he may come prepared to show that he does not fall within the law: But, if the prosecutors argument were to be admitted, a pannel might be convicted upon an indictment, charging an infringement of the laws in general, and not know, till after his conviction, either the statute upon which he was tried, nor the penalty he was to incur.

It is too late to maintain such doctrines as this. Even so far back as the days of Sir George M'Kenzie, when the forms of criminal procedure were not much advanced in point of accuracy and precision, he gives it as his opinion, that indictments ought regularly to express the particular acts upon which the proposition is founded; and it is believed, that, for these very many years past, an example will not be found where the enactments of a statute have been applied in the case of a conviction upon an indictment where the statute has not been libelled.

B. 2. tit. 21.

Not long ago your Lordships had occasion to canvass this very argument in the case of Gabriel Hallyday, indicted for perjury at the instance

inſtance of Baillie Rob one of the magiſtrates of Weſter Anſtruther. In that caſe, the indictment was laid both at common law and upon the act 19. parliament 5. of Queen Mary againſt bigamy; which act only contains an implied declaration of what were underſtood to be the pains of perjury at that time. The act which ought to have been libelled, was the poſterior ſtatute, the 47th act, parliament 6. of Queen Mary, expreſsly relative to that particular perjury committed by a witneſs upon oath. Your Lordſhips conſidered this as a very fatal objection to the indictment; but it never entered into your minds, that, under the general charge of perjury being againſt the laws of the realm, you were at liberty to ranſack the ſtatute-book in order to find a ſtatute and a puniſhment not contained in the libel.

It is ſaid, in the information for the proſecutors, "That many acts "of parliament have paſſed with regard to the crime of theft; but "few or no indictments are to be met with that libel any of theſe "acts. It is ſufficient that they mention the act of theft to be a "crime by the laws of the realm in general." But in this argument the proſecutors do not advert, that theft is a crime by the common law of Scotland; and therefore the indictment is properly laid upon the laws of the realm in general; and therefore the proſecutor's obſervation totally claudicates, unleſs he could point out an example, where a ſtatute has appointed a particular puniſhment to any particular ſpecies of theft; and that, notwithſtanding the ſtatute not being libelled upon, your Lordſhips had nevertheleſs found, that the general charge of the offence being againſt the laws of the realm was ſufficient notification to a pannel to come prepared againſt every law which, upon after inveſtigation, might be found in the ſtatute-book.

Thus the pannel has endeavoured to bring under the view of your Lordſhips thoſe grounds in law from which he apprehends himſelf intitled to conclude, that the crimes charged in the indictment are unknown in the common law of this country, upon which only the indictment is laid; and this was the firſt general propoſition he propoſed to maintain. He now proceeds to the *ſecond* and ſeparate ground of defence; namely, That the intereſt upon which the pro-

ſecutors pretended to ſue, was ſuch as the criminal law of this country did not acknowledge.

There is perhaps no particular in which the criminal juriſprudence of ancient and modern times differ more widely than in their manner of inſtituting criminal ſuits: Popular actions were the great favourites of Rome and other ancient ſtates; and indeed the notion of every perſon being equally intereſted and intitled to vindicate public wrongs correſponds very aptly with that equality, virtue, and purity of manners, which were the diſtinguiſhed characteriſtics of the ancient republics in the earlier periods of their government.

But however conſonant ſuch an inſtitution might be to the pure and upright manners of an early period, it is obvious to the ſmalleſt reflection, that it could not fail of proving highly incommodious in proportion as the ancient ſimplicity of manners decreaſed and depravity and corruption gained ground in the ſtate.

The conſequence naturally to be expected did accordingly happen. Proſecutors, in place of being actuated by virtue and the love of the republic, made uſe of that privilege which the law allowed them in order to give vent to their own implacable fury and revenge.

The law was obliged to interpoſe in order to remedy the evil: At firſt an oath of calumny was invented; but this cheque was very far from reſtraining the evil: It grew to ſo enormous a height, that the Romans were obliged to impoſe a ſeverer cheque, by obliging the proſecutor to ſubmit himſelf to a ſimilar puniſhment in caſe he failed in his proſecution. Voet gives an account of this progreſs of their law in the following words: "Ne autem temere quis per accuſatio-
"nem in alieni capitis diſcrimen irruerit, neve impunita eſſet in
"criminalibus mentiendi atque calumniandi licentia, loco jurisjurandi
"calumniae adinventa fuit in crimen ſubſcriptio, cujus vinculo ca-
"vet quiſque, quod crimen objecturus ſit, et in ejus accuſatione uſ-
"que ad ſententiam perſeveraturus, dato eum in finem fidejuſſore.
"Simulque ad talionem, ſeu ſimilitudinem ſupplicii ſeſe, obſtringit, ſi
"in probatione defeciſſe, et calumniatus eſſe, deprehenſus fuerit."

Tit. de accuſ. et inſcript. § 13.

There can be little doubt, that, if the Roman law had continued long to flouriſh, there muſt have been ſome other alteration in this matter;

matter; for, as a late author obſerves, it was indeed a complete bar to falſe accuſations, being in effect a prohibition of proſecutions at the inſtance of private perſons; for what man would venture his life and fortune, in bringing to puniſhment a criminal who had done him no injury, however beneficial it may be to the ſtate to have the criminal deſtroyed? This would be an exertion of public ſpirit ſcarce to be expected among the moſt virtuous people, not to talk of times of univerſal corruption and depravity.

Another conſequence of this ancient mode of inſtituting criminal proſecutions, was the introduction of an infamous and malicious ſet of informers, who flattered the vices of their princes at the expence of the lives and fortunes of their fellow-citizens. It will not be unacceptable to your Lordſhips to hear, upon this ſubject, the ſentiments of the great author of the Spirit of Laws, and the preference he gives to modern inſtitution. "In Rome it was lawful B. 6. tit. 8.
"for one citizen to accuſe another; this was according to the ſpirit
"of the republic, where each citizen ought to have an unlimited
"zeal for the public good, and where each citizen is ſuppoſed to hold
"the whole rights of his country in his hands. Under the Emper-
"ors, the republican maxims were ſtill purſued; and inſtantly a per-
"nicious ſet of men ſtarted up, a whole ſwarm of informers; whoſo
"ever had numerous vices and abilities, a mean ſoul, and an ambiti-
"ous ſpirit, buſied himſelf in the ſearch of ſome criminal whoſe
"condemnation might be agreeable to the prince: This was the road
"to honour and fortune; but luckily we are ſtrangers to it in our
"country.

"We have at preſent an admirable law, namely, that which re-
"quires that the prince who is eſtabliſhed for the execution of the
"laws, ſhould appoint an officer in each court of judicature, to pro-
"ſecute all ſorts of crimes in his name: By this means the profeſ-
"ſion of informers is a thing unknown to us; for if this public aven-
"ger were ſuſpected to abuſe his office, he would ſoon be obliged to
"name his author.

"By Plato's laws thoſe who neglect to inform or to aſſiſt the ma- Lib. 9.
"giſtrates, are liable to be puniſhed. This would not be ſo proper

"in

" in our days. The public profecutor watches for the ſafety of the " citizens; he proceeds in his office, while they enjoy the ſweets of " tranquillity."

No wonder that modern ſtates, warned by ſuch ſtriking examples, have been inſtructed to aſſume a different mode of proſecution. In moſt countries, a *calumniator publicus*, ſuch as mentioned by Preſident Monteſquieu, is appointed, who acts at his peril in the execution of criminal law. This in particular is the caſe in this country, with this exception only, that thoſe having a *legal* intereſt are intitled to purſue in their own name, with the concourſe of his Majeſty's advocate. In England, a cheque of peculiar utility prevails; for, if it is a miſdemeanor proſecuted by information, it muſt be proſecuted, if the pannel is not miſinformed, either by the attorney-general *ex officio*, or upon leave of the court to file the information. If it is an offence triable only by indictment, it is neceſſary that the approbation of the grand jury muſt precede the trial; ſo that in whatever ſhape the proſecution is inſtituted, the laws of England have wiſely provided ſuch cheques as effectually prevent proſecutions at the inſtance either of vindictive proſecutors or malicious informers.

Taking it for granted, therefore, that, inſtructed by the experience of former ages, popular actions are the odium and abhorrence of modern times, and peculiarly ſo of this country, the pannel ſhall proceed to conſider the intereſt condeſcended upon by the preſent proſecutors; and if he ſhall be ſo happy as to convince your Lordſhips, that the doctrines maintained by them go ſo far as to countenance popular actions of the moſt dangerous nature, he reſts ſatisfied you will not think proper to introduce ſo pernicious an innovation into the criminal law of this country. The pannel has already admitted the exception in the law, whereby private proſecutors, having a legal intereſt, are allowed to purſue; and therefore the queſtion to be conſidered is, Whether the proſecutors have produced any intereſt which can be ſuſtained either upon principles or precedents in the criminal records of this country.

The intereſt of the proſecutors is ſomewhat different; and therefore falls to be differently conſidered. Mr Geddie ſays, That he was

a magiſtrate at the time the bribery libelled was committed, or attempted to be committed, and therefore is intitled to ſue an action brought for the purpoſe of puniſhing a crime committed within the borough, and ſo deſtructive of the purity and chaſtity of its morals.

Now, your Lordſhips will conſider how far this argument will go, and will then determine whether it does or does not tend to the introduction of popular actions.

Deſtructive as the tendency of bribery may be, it will not be ſaid that it is more or even equally enormous with a multitude of other crimes that can be mentioned. Murder, adultery, theft, and the pannel will beg leave to add drunkenneſs to the catalogue, are all of them equally deſtructive of the chaſtity and purity of the morals of the borough, and equally repugnant to the well-being of its conſtitution; and therefore the firſt concluſion flowing from the proſecutors doctrine is, that every magiſtrate and counſellor of every royal borough in Scotland, is intitled to aſſume the character of *calumniator publicus* in every crime committed within or concerned in the well-being of the borough.

But this is not all; the powers and juriſdiction of the juſtice of peace in counties is cumulative with that of the magiſtrates and counſellors in the boroughs within their county; and therefore they, no doubt, by the ſame rule, would have the ſame power of proſecution as either the magiſtrates or counſellors.

And the matter does not ſtop here; for the juſtices of peace would likewiſe be intitled to the ſame power with regard to every crime committed within their reſpective counties; ſo that really, if a latitude in this matter is to be allowed, there is no defining how far the proſecutors principle would carry us. If vague and indefinite intereſts are to be admitted, every individual of the kingdom may ſay he is liable to be taxed and ſubject to the laws of the realm, and may therefore lay claim to his title of purſuing a crime ſo immediately tending to affect the purity of repreſentation in parliament.

Many other obſervations might be offered to ſhow the danger of departing from the rule of law, whereby every perſon is allowed to have a legal intereſt in thoſe crimes which affect his *perſon, character,*

and goods; ſome likeways add *family*, which perhaps is unneceſſary; becauſe, altho' one is likewiſe allowed to vindicate the injuries done to thoſe with whom he is immediately connected in family; yet a man's family is with no great impropriety conſidered as a part of his perſonal ſtate; and therefore falls under that intereſt allowed to every man to vindicate the injuries criminally offered to his own perſon.

The pannel has been at pains to make the ſearch, and is not able to find an example where the rule of law, limiting a criminal intereſt in the manner now ſuggeſted, has ever been departed from, ſo as to allow any perſon to vindicate in a criminal action any injury, except what has been committed againſt his character, goods, family, or perſon, and when there is ſo clear and rational a principle and rule by which to judge, it is not imagined your Lordſhips will be inclined to depart from it; for otherways, ſuch a multitude of vague intereſts will be condeſcended upon, you will find yourſelves engaged in a labyrinth of wildneſs and uncertainty, without any one rule by which to extricate your judgement.

The proſecutors, at the pleading, condeſcended upon various examples, which they ſaid were deviations from this rule: But all of theſe fell ſo clearly under it, that they are now dropt out of their information, and one only remains, *viz.* the caſe of Mr Lockhart of Lee againſt the rioters of Lanark: But this might have been omitted as well as the reſt; for the ſmalleſt attention will prove it to fall directly within the rule. The caſe there was, that the ſettlement of Mr Lockhart's preſentee to the kirk of Lanark, was obſtructed by the rioters, afterwards brought to trial; unleſs, therefore, the proſecutors can maintain, directly in the face of law, that a right of patronage is not a right of property, it is impoſſible to maintain that a riot, obſtructing the ſettlement of his preſentee, did not affect Mr Lockhart in his goods or property.

A caſe is put, ſuppoſing that the Michaelmas election of magiſtrates and counſellors had been overawed by force, ſo as that the pannel had gained a majority; and the queſtion is put, Whether in ſuch a caſe, a criminal action would not have been competent at the inſtance of the chief magiſtrate of the borough?

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The anſwer to this queſtion depends entirely upon the circumſtances of the force. If one or two individuals had been privately with-held from the meeting by force, whatever civil action might have been competent to any member of council to remedy the wrong, the pannel does deny the competency of any criminal action for the forcible detention at the inſtance of any but the perſon himſelf who was detained; and the ſame with regard to the caſe of the bribery of individuals, except in the caſe where the pupular action is given under the ſtatute. But, on the other hand, if the force was exerciſed in a riotous and tumultuous manner againſt the meeting of the council in general, then no doubt a criminal proſecution might have been ſuſtained at the inſtance of any of the individuals, becauſe directed againſt each of them perſonally. However, even in this caſe, it would be more regular to have the action brought at the inſtance of the public proſecutor.

So much with regard to the intereſt of Geddie; the general principles of which do no doubt likeways apply to the intereſt claimed by Mr M'intoſh, who claims a title to purſue both as a counſellor elected at laſt Michaelmas, and as a candidate for the office of provoſt and member of parliament.

With regard to his character as counſellor elected at laſt Michaelmas, the ſame obſervations apply to it as to Mr Geddie, with this addition, That his intereſt in that reſpect is rather weaker, in ſo far as he was not a counſellor at the time the bribery is ſaid to have been committed within the borough; and therefore can have no more title, in the view of preſerving the morals of the borough, to purſue this bribery, than any other crime which may have been committed any given number of years paſt.

In ſo far as Mr M'Intoſh claims a title on account of his candidateſhip either for provoſt or member of parliament, the pannel does likeways deny that this is an intereſt which the law can acknowledge. It may be true, that now a-days ſuch offices are ſought after with the moſt eager attention; but it is likeways true, that in the idea of law, they are conſidered not as rights or privileges, but,

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on the contrary, as burdens or ſervices which men are compelled to undertake: It would therefore be ſomewhat abſurd, if a perſon was allowed to purſue criminally, becauſe he was prevented from undertaking an office which the law conſidered as a burden.

As your Lordſhips will rather chuſe in this, and in every other queſtion, to be guided by clear and unalterable rules of law, than to be left at arbitrary diſcretion without any rule to direct your ſteps, the rule in this caſe is patent, if your Lordſhips think proper to adopt it. The only ground upon which a perſon claims a right to purſue criminally, is becauſe he is hurt. Now, it is impoſſible that, in a legal ſenſe, any perſon can be hurt or injured without having it in his power to ſue for reparation of that injury.

Accordingly, if your Lordſhips will attend to every caſe where the intereſt of a private proſecutor is admitted ſo as to purſue criminally, the ſame intereſt would warrant him to purſue reparation before a civil court. In the caſe of murder, there is the action of aſſythment: In the caſe of a rape, an action *in ſolatium* and for damages is likeways competent: In theft, the action for reſtitution is undoubted; and ſo upon examination will be found to hold with regard to other caſes.

Here then is a clear and invariable rule of law by which this matter may be at all times eaſily explicated, and the boundaries properly defined betwixt the rule of law, that there ſhould be no popular actions, and the exception from that rule, that every perſon having a legal intereſt is intitled to purſue.

By this rule then let the preſent queſtion be tried; and the pannel begs leave to aſk, whether Mr M'Intoſh would be allowed to purſue a civil action for reparation of damages becauſe he had been diſappointed in his election either as provoſt or member of parliament? He certainly would not. This was one of the queſtions ſtated to Engliſh counſel in the queſtion betwixt Sir John Gordon and Colonel Scott, and the anſwer of Sir John's own counſel was, that he never knew ſuch an action, and did not believe it would lie.

It is, however, unneceſſary to dwell longer upon this argument; for it is in a manner admitted on the part of the proſecutors, that Mr M'Intoſh's intereſt as a candidate would not give him a legal intereſt

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to purſue this action; for, in anſwer to the argument which the pannel drew from the caſe of Sir John Gordon, deſiring to compel his Majeſty's Advocate to proſecute Colonel Scott at his own inſtance, becauſe he was adviſed he had no intereſt to purſue in his own name, the proſecutor ſays, "That Sir John Gordon was no magiſtrate or "counſellor, but *quilibet e populo*, having no title; and therefore, had "no other method left but by applying to the public proſecutor to "take up the cudgels for the public intereſt." Sir John Gordon was a candidate full as ſeriouſly as Mr M'Intoſh; and therefore, if his character, as a declared candidate againſt Colonel Scott, did not give him a title to purſue, it does not occur upon what principle the intereſt of Mr M'Intoſh can be one bit ſtronger in oppoſition to Mr Dempſter. Inform. p. 15.

The proſecutors are at pains to enlarge upon the bad conſequences which they ſuppoſe will follow, if the crime of bribery was not allowed to be proſecuted at the inſtance of ſuch purſuers as they; and it is ſaid, that no ſuch proſecution would ever be brought unleſs at the inſtance of thoſe particularly hurt by it.

But the pannel muſt be forgiven to object to this doctrine in all its parts: For, in the *firſt* place, He does humbly deny that there is any neceſſity for ſuch actions as this, in order to curb bribery, in ſo far as it is any one degree prejudicial to the freedom of elections. The election itſelf, in ſo far as corrupted, is remediable by the civil action well known to your Lordſhips; and in fact this very election for the town of Coupar made at Michaelmas laſt, is at preſent in dependence for reduction before the Court of Seſſion, and almoſt the ſame witneſſes examined in the one that have been cited in the other. Beſides, this civil action known in law for the reduction of the election, the ſtatute, the ſecond of George II. has given a criminal action for high penalties where it thought a criminal action was proper or expedient; and therefore it really does not occur even what reaſon there is to wiſh for more actions relative to bribery than what the law has already introduced. But,

2*dly*, If your Lordſhips will have this action at common law likewiſe introduced, the pannel can ſee no reaſon why, more than

any other public crime, it may not be left to the cool and diſpaſſionate attention of the public proſecutor. In theory, perhaps, it may have a very ſingular appearance, that ſo much power ſhould be veſted in any one man, or that the advocate of Scotland ſhould be upon a footing with the grand jury of England; but experience is the ſureſt teſt to reſort to; and if the pannel is rightly informed, an example will ſcarce be produced where, ſince the criminal law of this country was eſtabliſhed upon a regular footing, that officer of the law was ſuſpected of abuſing his truſt by relaxing where ſeverity was proper, or by rigorous meaſures, where meaſures of a contrary kind would have been more proper: And the pannel ſhall further obſerve, that if on any occaſion he ſhould appear more remiſs than he ought to be, your Lordſhips would have, as uſual in many caſes, an opportunity of reminding him of his duty, as moſt of thoſe bribery-queſtions come before you in another character.

But ſince the proſecutors have indulged themſelves with pointing out imaginary conſequences, if their title ſhould not be ſuſtained, the pannel will be forgiven to take notice of moſt real and certain conſequences, in caſe it ſhall be ſuſtained.

It is needleſs minutely to tell your Lordſhips of that plentiful crop of litigation which enſues in the civil court on occaſion of every diſputed election for a member of parliament; you know it well to your ſad experience: But what will be the reſult, if this new door for litigation is opened, it is impoſſible for any perſon to foretell. It needs but a beginning to make it faſhionable; and as it ſeems to be a maxim now fully eſtabliſhed in the political practice of this country, that no election muſt be loſt without the candidate doing honour to himſelf and his party by two or three law-ſuits in the civil courts; ſo, if your Lordſhips ſhall go on to eſtabliſh, in the *firſt* place, that every ſpecies of bribery, and in every degreee, is proſecutable as a crime at common law; and, in the *ſecond* place, that it can be purſued at the inſtance of any perſon who may conceive himſelf to be injured; it is obvious, that the animoſity and keenneſs of political conteſts will ſoon be as productive of criminal proſecutions as they now are of civil queſtions; the honour of the party

will

will become as much intereſted to go through with the one, as it now is to carry on the other.

And here your Lordſhips will not fail to obſerve how wide the field is. It is not money alone which law conſiders as a bribe, but every office, gratuity, promiſe, or even hint of gratuity, are all culpable in the eye of law; ſo that when every circumſtance which may occur on occaſion of a warm conteſted election is aggravated and augmented by party-rage and political reſentment, it is left with your Lordſhips to judge what a field muſt inevitably open in every borough and county of the kingdom. The pannel avoids to mention the train of falſhood and perjuries which muſt neceſſarily enſue; theſe are too obvious to require particular notice.

The proſecutors ſay, that all theſe conſequences will be ſufficiently guarded againſt by the concourſe of his Majeſty's advocate, which will not be given to authoriſe malicious proſecutions. But your Lordſhips know, that this anſwer is a mere farce, when you attend to the manner in which the concourſe of his Majeſty's advocate is given. The concourſe makes the title neither better nor worſe; and therefore is given as a matter of courſe. It has even been doubted how far his Majeſty's advocate is at liberty to refuſe it. Certain it is, that when Sir Thomas Hope his Majeſty's advocate refuſed to ſubſcribe two bills of improbation, the court of ſeſſion compelled him to do ſo; and by an act of ſederunt, bearing date in January 1633, it made a general order concerning the duty of his Majeſty's advocate in all ſimilar caſes. But whether he is or is not at liberty to refuſe, it will in no ſhape vary the argument; for if the title and intereſt of ſuch proſecutors as the preſent is once ſuſtained, no advocate will ever take it upon him to refuſe it to any perſon who, in the height of political frenzy, can in no event be difficulted to ſupport his demand by bold averment.

In the *laſt* place, it was objected on the part of the pannel, That although bribery itſelf ſhould be thought indictable at common law, ſtill the whole of the indictment muſt fall to the ground, in ſo far as it charges bare and unſucceſsful attempts to corrupt, which are not of ſuch a nature as to be proſecutable in this ſupreme criminal court,

court, especially at the instance of private prosecutors, who in no event could qualify the smallest injury or damage from those attempts.

If the pannel has been successful in satisfying your Lordships, that bribery itself is not a crime at common law, there is an end of this part of the question: But even although bribery itself were actually punishable both at common law and by statute, the pannel does humbly dispute that an attempt to gain a vote by money, or the promise of money, is punishable as a crime. Bribery is not an idea known in the law of nature or the general rules of morality; and therefore being statutory and municipal, it is the statute must determine how far it is necessary it should proceed before it is to be viewed as partaking of a criminal nature.

Now, when the statutes respecting this subject are looked into, your Lordships will observe, that an attempt to bribe is never stigmatized as criminal, unless the corruption has actually taken effect; and therefore, although the prosecutors were even to prevail in their constructive reasoning, that every degree of bribery was to be esteemed criminal, because the criminality of bribery in general was established by statute, still even that argument would not carry them through in this part of their indictment; for the criminality of an attempt to bribe is established by no statute.

Nor will the authorities resorted to by the prosecutors avail them; for, by their own showing, authors are not at one upon the point: And even as to those cases where they do consider an attempt towards a crime to be in itself criminal, the very attempt in those cases does carry along with it a distinct species of crime; for example, although an attempt to poison or to assassinate a man does not amount to the crime of murder, still it is punishable of itself; because it is criminal to bring any of his Majesty's leidges into a terror for their lives. The same observation and reasoning will apply to most other cases where attempts to commit crimes are considered as punishable.

But further, although it should be thought that both bribery and attempts to bribe are criminal, still the prosecutors do not advert to the additional and, with submission, unanswerable objection that

would

would lie to their title of purſuing upon this part of the indictment. A private proſecutor muſt ſurely have ſuffered a hurt of ſome kind or another before he can complain: But the pannel cannot poſſibly diſcover where is the hurt ſuſtained by thoſe proſecutors, when, by the ſhowing of their own libel, the attempts to hurt them were totally unſucceſsful. If your Lordſhips ſhall be of opinion, contrary to the expectations of the pannel, both that bribery and attempts to bribe were crimes at common law, proſecutable at the inſtance of the public proſecutor, and likeways that bribery actually committed was proſecutable at the inſtance of a private purſuer who has been hurt; ſtill, how attempts can be proſecuted at the inſtance of a private purſuer who confeſſedly is not hurt, is to the pannel incomprehenſible.

Upon the whole, the pannel with chearfulneſs ſubmits himſelf to the judgment of your Lordſhips, and reſts ſatisfied you will be of opinion, *firſt*, That the crime as laid is not competent; *ſecondly*, That although it were competent, it is not actionable in a criminal court at the inſtance of thoſe proſecutors; and, *laſtly*, That, in all events, that part of the indictment which charges only bare and unſucceſsful attempts to corrupt, is totally irrelevant, and falls to be diſmiſſed.

In reſpect whereof, &c.

HENRY DUNDAS

would lie to their title of pursuing upon this part of the indictment. A private prosecutor must therefore surely have suffered a hurt of some kind or another before he can complain: But the pannel cannot possibly discover where is the hurt sustained by those prosecutors, when, by the showing of their own libel, the attempts to hurt them were totally unsuccessful. If your Lordships shall be of opinion, contrary to the contentions of the pannel, both that bribery and attempts to bribe voters are crimes at common law, prosecutable at the instance of the public prosecutor, and likewise, that bribery actually committed was prosecutable at the instance of a private pursuer who has been hurt; still, how attempts can be prosecuted at the instance of a private pursuer who confessedly is not hurt, is to the pannel incomprehensible.

Upon the whole, the pannel with cheerfulness submits himself to the judgment of your Lordships, and rests satisfied you will be of opinion, *First*, That the crime as laid is not competent; *Secondly*, That although it were competent, it is not cognoscible as a criminal cause at the instance of those prosecutors; and, *Lastly*, That, in all events, that part of the indictment which charges only bare and unsuccessful attempts to corrupt, is totally irrelevant, and falls to be dismissed.

In respect whereof, &c.

HENRY DUNDAS.